THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JUNE 4, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

EX PARTE BRIDGES.—We take pleasure in laying before our readers at this early day the opinion of Mr. Justice Bradley in the above case, affirming Mr. District Judge Erskine, whose able and elaborate judgment we published two weeks ago (p. 327). The decision is placed upon the ground of an entire want of jurisdiction in the state courts to punish a crime committed against another soverignty; and the crime of perjury is distinguished from counterfeiting and the like, which may be a crime equally against the United States and an individual state.

OUR sanctum was honored last week by a call from Judge Bradwell of Chicago, and his talented lady, who edits the Chicago Legal News. We are glad to learn that that journal is still enjoying a high degree of prosperity. To the extensive printing office connected with the Legal News, a stereotype foundry has recently been added. Such evidences of prosperity in that journal go far toward refuting the assertion of an eastern cotemporary, that law reporting is not the proper office of a legal journal. Nine out of every ten of our subscribers value this feature of this journal above all its other features. The almost universal sentiment which reaches us from them is "give us cases carefully reported, so that they will be available to us for immediate use." If a weekly law journal can subsist and thrive merely as a journal of legal news and criticism, we are glad that it is so; but until the wants of a majority of our subscribers change, this journal, while endeavoring to be to some extent a vehicle of legal news and criticism, will continue to regard its chief office to be the publication of adjudications of the courts, judiciously selected.

THE SAINT LOUIS BAR ASSOCIATION.—A special meeting of the bar association was held at the rooms on Wednesday, May 26th. There was a large attendance, the object of the meeting being to hear and act upon the report of the special committee of five, appointed to prepare and submit a constitutional provision for a court of appeals for St. Louis county. The committee recommended that a court be created to consist of three judges, and be called the St. Louis Court of Appeals; the decisions of such court, to be final in all cases except constitutional questions, questions of state revenue, or affecting the title to office of state officers; and cases wherin the judiciary act gives an appeal to the United States Supreme Court. The terms of office of the judges is fixed at nine years, one judge to be elected every three years. The opinions of the court are to be in writing and published, as are the decisions of the Supreme Court. The committee also recomended that the circuit court in general term be deprived of its appellate jurisdiction; but that it have power to sit for such other purposes as may seem best to it, such as framing rules, harmonizing practice, etc.

The report of the committee was, after full argument, adopted by the association, with the addition of a resolution, that it was inexpedient that appeals should lie from the St. Louis Court of Appeals to the Supreme Court, based upon the amount of the judgment. A resolution was introduced by Judge Rombauer and referred to the judiciary committee, providing that juries shall consist of not more than six persons, and that unamimity shall not be essential to a verdict, except in cases involving the life or liberty of a person. The meeting then adjourned.

THE REVISED STATUTES OF THE UNITED STATES.—We find in a corner of a foreign cotemproary, the following statements concerning the Revised Statutes of the United States. We presume that the main points have been obtained from some American source:

The "Revision of the Statutes" in the United States appears itself to require revision. On a careful examination of these revised statutes many important errors and omissions have, it is stated, been discovered. A great number of obsolete and useless old statutes have been carefully compiled; such, for instance, as one which provides that a militiaman must appear upon parade fortified with a matchlock, a portfire, a certain number of flints, and a pair of bullet moulds. The volume has, in truth, been found utterly worthless, and the 10,000 copies printed by order of the government are only valuable as waste-paper. The enacting clause, which makes the book a legal statute, goes on to say that any old laws, no part of which is compiled in the said volume, are law still. So the inference is drawn that everything is law not contained in the book denominated the revised statutes. The art of legislation appears to be almost as imperfectly understood in the United States as in this country, and the results are sometimes extremely embarrassing. When, however, the errors discovered are of exceptional magnitude, it is found convenient, on the principle of not awakening a sleeping sorrow, to take no notice of them. This course was adopted with regard to a law passed in July, 1870, codifying the patent laws, which practically abolished some of the principal departments of the government. Perhaps it was thought that this accident might prove at some future day a convenience rather than a misforture.

We are not prepared wholly to admit or deny these extraordinary statements, except the one that the 10,000 copies printed are only valuable as waste paper. We have, however, heard complaints that the citations of cases are very inaccurate; and we need not suggest to any one who has seen the book, that as a specimen of printing and binding, it would not do credit to a respectable publishing house. Aside from the index, which appears to be exhaustive, it would not be hazarding much to say, that it is in all respects inferior to the admirable digest of Mr. Brightley, to which the profession have owed so much. But nevertheless we apprehend that the above statements in the main illustrate the propriety of going away from home to learn the news.

PROFESSIONAL ADVERTISING.—A shyster, or an imposter who pretends to be a shyster, has sent us the following advertisement (the name and address of which we omit, as we do not propose to give him any gratuitous advertising) with the request that we should insert it in this journal:

ABSOLUTE DIVORCES OBTAINED FROM COURTS OF DIFFERent states, for desertion, etc. No publicity required. No charge until divorce granted. Address ——, Attorney, —— New York.

This request is couched in the following language:

To the Editor or Publisher:

The peculiar nature of my business compels me to deal directly with the principals of newspapers for my advertising. The advertisement at the head of this card has been published for the last sixteen years in the New York Herald, New York Sun, the Waverly Magazine, New York Sunday Mer-

cury and New York Dispatch, to all of whom I refer as to whether I pay all *true* bills. Insert the advertisement as "set up" above, in your paper, for six months, sending me first number containing same, with your bill for half of whole amount, and I will remit by return mail. In making your price for my advertisement, you should bear in mind that the article I advertise may not be required by any of your readers, therefore the price should be very low. The amount of bill for the remaining three months I will remit at the expiration of the first three, thus making the whole amount in advance.

Yours, etc.

We quite agree that the "article" this fellow advertises may not be required by any of our readers; and whilst we are quite willing to believe that the journals he names have published this advertisement for the last sixteen years, we do not care to lend our columns to the publication of such an imposture. We have examined Ulman's Legal Directory, and find therein no attorney of the name signed to the above advertisement—an omission which could scarcely occur in case of an attorney who has carried on business in one place for sixteen years. We conclude, therefore, that this fellow is not a member of the profession, but that he is either an ordinary swindler, or else a divorce-broker, who carries on his business through the aid of shysters, who, while avoiding responsibility, are content to share with him the proceeds of the nefarious work. If the bar association of New York is not a mere cypher, it will take pains to hunt up and prosecute the imposter who is thus bringing disgrace on the profession. We will cheerfully furnish his name and address, if requested.

Saint Louis is not without a case of the same kind; and our bar association has taken steps towards his punishment, but with what results we have not learned.

The medical profession is infested with creatures of the same character; and our neighbor the Louisville Medical Weekly deserves the thanks of that profession for its fearless and manly denunciation of them.

The Organization of the Supreme Court of New Hampshire.

In examining the recent decisions of this court, we have been not a little perplexed at the peculiar manner in which the court is organized, and have not been able to ascertain what judges have concurred in the various decisions. From a recent letter of the able reporter, Mr. Shirley, we learn that the constitution of that state is peculiar in many respects. The terms "supreme judicial court," and "superior court of judicature" are used indiscriminately in that instrument. They both mean the supreme court,—the constitutional court of last resort in the state. The supreme judicial court went out of existence last August. The last of its decisions will be reported in vol. 54. That court was composed of six judges, each of whom tried causes at the circuit and sat upon the same cases at the law term, which they had tried at the circuit. The superior court and the circuit court have taken the place of the supreme judicial court.

These courts are constituted as follows: *Superior Court:* Edmund L. Cushing, Chief Justice; William Spencer Ladd and Isaac William Smith, Associate Justices. *Circuit Court:* William Lawrence Foster, Chief Justice; Edward D. Rand and Clinton Warrington Stanley, Associate Justices. Under this system all law questions are decided by the superior court, unless its members are disqualified. The purpose of the act was to relieve those judges substantially of circuit duty. The fundamental distinction, however, between this system and the old is this: No judge under the new system can sit in the law court, in any case which he has tried at the circuit. When thus disqualified, the senior judge of the circuit court, who is not disqualified, sits at the law term in his place. The judges of the circuit court perform the greater part of the circuit duties. This the three circuit judges could not do if it were not for the referee law. This law authorizes the court to send any civil cause to one or more referees—usually intelligent members of the bar—who try the cause upon legal principles, as the judges would, and return their findings into court. This of course is a great relief to the circuit judges. The decisions of the superior court commenced with the Dec. term, 1874, and will appear in vol. 55.

We have thought it of sufficient interest to the profession to warrant us in making these explanations at length, as Mr. Shirley has furnished them to us; because in our judgment there is no court in the Union whose decisions are deserving of a higher degree of confidence and respect than those of this court. The judges appear to enjoy the advantages of a high degree of general culture and a sound legal training; and, what is of the greatest consequence, they appear to have ample time for the investigation of the important questions which come before them. This will, we are confident, give their decisions a reputation equal to those of the Supreme Court of Michigan, which has for some years, we are persuaded, stood foremost among the state courts.

Contempt.

Much of the confusion in the matter of the Chicago contempt case, it seems to me, is due to the attempt to make a distinction where there is none—to maintain a constructive contempt as distinguished from an actual contempt;—as if there were really a difference, in law, between the actual and the constructive;—as if a thing could properly be construed to be what it properly is not; as if truth were not the accordance of the affirmation with the fact affirmed; as if a construction which is not conformable to the fact construed were not a misconstruction.

"Such contempts are *actual*, not constructive," says one. "An attempt has been made," says another, "to distinguish between actual contempt of court—that is, acts or words tending to impede the administration of justice—and constructive contempt,—that is, acts or words tending not to impede the administration of justice, but such as are, by a mere fiction, construed by the courts into contempt. To this distinction there can be no sort of objection, provided it is carried out logically and rationally. But it is not carried out in that way"—continues the latter. To which I will add,—Nor ever can be. Analysis says—I can not find it. Reason says,—It is not in me. In trying to maintain this "fiction" one will be sure to contradict, and very likely confuse himself, and perhaps also confuse others. Judge Story's chapter on constructive frauds, in his equity jurisprudence, is in itself a contradiction. He says,—"there must be some ingredient of fraud or some wilful misstatement or concealment which has misled the other side;" that is, actual fraud. Burrill defines constructive fraud to be—"fraud inferred by law, as distinguished from positive, actual or intentional fraud." Of such is twaddle. To infer fraud where there is none, is a false inference. Similarly of con-

structive larceny, constructive notice, and the like. Larceny implies a felonious or unlawful taking; notice, of making something known—information of something done, or to be done, and the like. It is said, for instance, that putting a deed on record is notice to all the world. But that we know is not true. It is, indeed, all that one is required to do; it stands in place of notice; it is the equivalent of notice—but it is not notice to one who does not know of it.

In the unfinished fragment of the conversation between Socrates and Cleitophon, "Do not give me the mere name," said the latter, "but tell me what justice is." Do not give me an example of the beautiful, lest there may be others unlike it; but tell me what the beautiful itself is. What is its objective characteristic? What its constituent essence or idea? In like manner, it seems to me, when we have considered what the essential characteristic of contempt is, we may more readily judge of examples. Burrill, citing Blackstone, defines contempt to be—a disobedience to the rules, orders or process of a court of justice, or a disturbance or interruption of its proceedings. But this, it seems to me, is rather an example than a definition. To contemn, we all agree, is to despise something or somebody, as unworthy of our respect. If the object is not entitled to our respect, there is no reason for complaint. But the courts are entitled to our respect. To respect them is a public duty; and duty, like right, is sacred; it is the conservative principle of society—the neglect to observe which is a public wrong; and when, as in other cases of wrong, the act is intentional, it is an offence. Then a wilful disrespect to the court is a contempt; and it does not matter whether it be to the person or to the authority of the judge. The subject is admirably considered by Judge Marshall in the Burr trial. The question was, whether General Wilkinson was guilty of intentional abuse of the court or of its process. Was what Wilkinson did calculated and intended to contaminate the source of justice, and consequently was it a contempt of the court in which justice is administered? Was his conduct toward the witness who was to give his testimony in court an unfair practice? "Unless," said Judge Marshall, "the deviation from law were intentional—or unless the course of judicial proceedings were or might be so affected by it as to make punishment in this mode obviously conducive to a fair and correct administration of justice, the attachment will not be awarded." Whether or not the act be done in the presence of the court while in session is not necessarily the test. Remarks in a newspaper which have a tendency to prejudice the public with respect to the merits of a cause depending in court, and to corrupt the administration of justice have been held to be a contempt. 1 Dall. 319. So of a publication, pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors, or the counsel, is a contempt of court. Wallace 77-102. 12 Johns. 460. So also, where an officer proceeds in an execution after a supersedeas has been awarded and he knows it. So, too, of malpractice by an attorney. So, likewise, using means to prevent and preventing a witness from attending in court when duly summoned. So, also, of mustering a body of militia so near as to disturb the deliberations of court. Refusing to furnish papers—to return them when taken from the files—to pay alimony—to execute deeds—to obey an injunction;—bringing an action in the name of another without his privity or consent—meeting a judge in the road, on his way to preside a second time in the trial of a cause, and telling him his conduct at the first trial was disgraceful—all these and many others of like import and effect have been held to be contempts. And to hold is to construe. They have been deemed to be so, because they were so. It is reported that an Eastern philosopher, of rare appetite and digestive power, was asked by his host, what was most like a hog? To which the philosopher replied—a large sized pig. But we have no reported case I believe, in which a judge has decided that a pig of large size is a constructive but not a real hog. Yet, as in the late case in the circuit court of the United States, at Boston, for manufacturing a certain quality of Goodyear dental vulcanite rubber, after the service of an injunction, the question of intent plays the leading part,—the sense of which was once admirably expressed by the late Mr. John Y. Mason, while secretary of the navy, in a letter to Purser Holland. The purser had resigned his commission, and in his letter of resignation reflected on the secretary. "Your resignation," said Mr. Mason, "is accepted. Your letter, intended to be respectful, is not deemed to be otherwise." PELHAM.

The Rule in Gibson v. Chouteau—An Important Decision.

In the case of David L. Hammond *et al.* v. Nathan Coleman and Wife, in the Circuit court of Saint Louis county, Hon. Horatio M. Jones presiding, a decision has just been announced of more than ordinary ability and interest. Its great length, and the additional fact that it will be reviewed in a higher court, preclude us from publishing it in full at this time. We shall therefore content ourselves with giving the following summary and review of it, furnished by a correspondent who is familiar with the case, reserving the opinion itself for publication hereafter, should our space permit:

The suit is for the recovery of 240 acres of land immediately west of the centre of the city, which has been for many years a portion of what was known as "Peter Lindell's field." It is the north portion of the Joseph Hunot New Madrid relocation made in 1818, by Rufus Easton as the assignee of Joseph Hunot. The land is of great value, is laid out into streets and blocks, but is occupied by but two buildings of any consequence, viz., the residences of Levin H. Baker and Nathan Coleman, who take their title as heirs of Peter Lindell.—The plaintiffs deduced title through a regular chain of conveyance from Hunot, of the injured land to Vandenbeneden in 1810, Vandenbeneden to Easton in 1815, Easton to Hammond in 1823, and established that plaintiffs were heirs and grantees of heirs of Hammond.—The court held this chain of title good and connected. Defendants established that in the year 1831, Peter Lindell took possession of the land and fenced it up; that whilst so possessed in 1834, in consideration of $5, Joseph Hunot executed to said Lindell a quit-claim deed for the property, this deed the court holds conveyed no title to Lindell, as the relocated land was in lieu of land injured by earthquakes in New Madrid county which had been conveyed to Vandenbeneden by Hunot in 1810, and that consequently Hunot had no "right title or interest" in the relocated land to quit-claim. Defendant also offered a deed purporting to be made by the sheriff of St. Louis county, to Relfe & Chew upon sale on an execution

against Hammond in 1823. This deed was objected to for various reasons. 1st. The return of the survey and plat of location to the recorder of land titles was not made until 1833; plaintiff contended thence that there was neither legal nor equitable title in the land in 1823, which was subject to sale on the execution.

2d. That the deed offered not having been certified to be acknowledged under seal of the circuit court as required by the law of Missouri then in force, that the paper was not admissible as a deed.

3rd. If admissible, it described by well defined metes and bounds a tract of land on the ground, which was no part of the land sued for. The court sustained the second objection and ruled the deed inadmissible, without passing upon the other objections except to say "it will scarcely be necessary to do more than notice the other objections, which it must be confessed are of themselves very weighty if not invincible."

Deed from sheriff to Relfe & Chew, being thus disposed of by rejection, it followed that a deed from Relfe & Chew to Peter Lindell, dated in 1840, for "all their right, title and interest in the land derived through such sheriff's deed," fell with said deed.

By an act of congress passed the 30th of June, 1864, it is declared that: "All the right, title and interest of the United States in survey 2500 shall be and the same is hereby granted, relinquished and conveyed by the United States in fee simple and in full property to Joseph Hunot or his legal representatives." The question was, Who are the legal representatives of Joseph Hunot under this law and the proofs? Upon the paper title adduced, the court seems to have had no difficulty in concluding, that but for Lindell's long possession and the operation of the statute of limitations thereon, the plaintiffs were entitled to recover. In commenting upon the grounds assumed by counsel on each side to the effect that as the return of the survey and plat of location was not made to the recorder of land titles until 1833, there was never a legal appropriation of the land under the New Madrid certificate, the court says, "if this is law there is no escape from the conclusion that the plaintiffs have shown themselves the legal representatives of Joseph Hunot and are entitled to recover."

This would appear to be conclusive, that the court resolved the equities in favor of the plaintiffs, and but for the statute of limitations would have found in their favor. Indeed the decision is placed for defendants entirely upon the operation of the statute of limitations; and this brings us to review the conclusions of the court, by the light of the decision of the Supreme Court of the United States, in Gibson v. Chouteau, 13 Wallace. If we understand the grounds upon which Judge Jones places his decision, they are, that by the return of the plat and survey to the recorder of land titles, in 1833, the New Madrid location, then became complete to the land in controversy with Peter Lindell, then in possession as a trespasser, since 1831; that said return completing the location, Josheph Hunot's legal representatives from that date had, under the laws of Missouri, a sufficient remedy in ejectment, to evict the said Lindell; that not having availed themselves of this statute remedy, until after the act of congress of 1864 gave to the "legal representatives" of Joseph Hunot the legal title, Lindell and those holding under him, for the period of the statutory bar, had become seized of their equitable title, and became by operation of Missouri's law, the "legal representatives" of Hunot, within the meaning of the grant by act of congress of July 30, 1864;—simply stated, that, the statute of limitations transferred to Lindell, the equitable title, to which the legal title attached when issued by the grant, not as the court says, through the operation of "relation"—but because a recovery of the equitable title, was not only barred by the statute, but actually transferred by operation thereof to Lindell.

Some confusion arises from the use of the words "inchoate equitable title." It would seem to us, that an equitable title springing from congressional legislation, can not be an "inchoate" equitable one; it is either an equitable title or not so. "Inchoate equitable title," must originate with foreign governments, and appeal to the political power for their perfection; an "equitable title" springing from the bounty of congress as a relocation, has already had the sanction of the political power, and may safely invoke the judicial for its protection.

Hence we think the learned court falls into grave error, when it declares: "If after the exchange of titles, which takes place upon the completion of a new location, congress should grant the located land to an entire stranger, it is difficult to see what remedy could be afforded by the courts;" in other words, it is difficult to see how an equitable title granted by congress to public lands, to a citizen for a valuable consideration, (exchange of lands), can be protected by the courts from subsequent congressional invasion. We imagine when such a case arrives, the learned court itself will find a remedy with very little trouble, to transfer the legal title to the owner of the prior congressional equity.

The learned judge comments with much ability upon the effect of the statute bar, being to transfer the title and not alone to bar the remedy, and it is upon this ground as we understand it, that the case is decided for the defendants. In other words that a possession commenced in wrong (1831) by length of time and subsequent conveyances (which it is decided by the court, do not connect the occupant with the equitable owners—hence to them and their title he remains a stranger), is yet the owner of that legal title, which the United States grants to the legal representatives of Joseph Hunot, as owner of the equity arising from location, and who is held by the court to have been Samuel Hammond as assignee of Easton in 1823.

It appears that in 1864, congress made an attempt to perfect by grant, the title to the government land within survey 2500, which it had exchanged for the injured land in New Madrid county. But by construction given by the court to the statute of limitations, and its operation upon the equitable to a legal title now in *esse*—the "*bona fide*" purchaser is set aside and a stranger to the estate is substituted, through what may be called the "interference of the legislature," through the statute of limitations. The constitution of this state declares that: "The general assembly of this state shall never interfere with the primary disposal of the soil by the United States, nor with any regulation which congress may find necessary for securing the title in such *bona fide* purchaser." Who is the *bona fide* purchaser, the owner of the

exchanged land, or a trespasser in possession of this congressional grant? Could the legislature declare, that an act of congress granting this land to the legal representatives of Hunot, was not a "primary disposal" of the soil? Could they declare that whilst the legal title was in the United States, and the equitable one in a grantee of the United States, an intruder upon the land for twenty years should take the legal title granted, instead of the "*bona fide*" purchaser? Such a proposition would not be at variance from the same results pronounced by a court, as springing from an act of the general assembly. Such we understand to be the interpretation of this inhibition upon our legislature, in Gibson v. Chouteau.

It appears to us, that the case of Gibson v. Chouteau, 13 Wallace, is a case in every particular identical with the one of Hammond v. Coleman..

In the first case it was the New Madrid relocation of J. Y. O'Carroll; survey returned to the recorder of land titles in 1841; patented in 1862, and granted by special act of congress in 1866. In the latter case it is a New Madrid relocation of Hunot; survey returned to recorder in 1833, and granted by special act of congress in 1864, in each case for some reason, a congressional grant was made to the legal representatives of the original claimants. In the first case Chouteau had been in the adverse possession of the land over fifty years, but as the Supreme Court of Missouri, decided by title not connected with O'Carroll. In the present case Lindell has been in possession over 40 years, but not by title connecting him with Hunot. In the former case, in 39 Mo., the supreme court of this state decided that the equitable title of O'Carroll was barred against the plaintiffs recovery, by direct operation of the statute of limitations, and that when the legal title issued by the patent of 1862, it at once united the legal and equitable title, and that by *relation* the legal title ran back to the commencement of the equitable title and was barred with it by the stutute of limitations. So this court gave the land to Chouteau. On appeal to the Supreme Court of the United States that court reversed the decision, declaring that the doctrine of relation was a legal fiction which could only be used to advance the ends of justice in favor of a party "who stands in some privity with the party who initiated proceedings for the land and acquired the equitable claim or right to the title." "The defendants in this case were strangers to that party and to his equitable claim, or *equitable title*, as it is termed by the Supreme Court of Missouri, not connecting themselves with it by any valid transfer from the original or any subsequent holder." In the Hammond case the court hold that Lindell's deeds leave him a stranger to the original title and the court does not give defendant the title upon the ground of "relation" which the supreme court held in the Gibson case, and which was so emphatically repudiated by the Supreme Court of the United States, but upon the principle that the statute of limitations, in virtue of Lindell's occupation, divested the legal representative of Hunot of his equitable right to the title and vested that equitable right in Lindell, through which investiture he became the legal representative of Hunot under the act of Congress. This conclusion, to say the least of it, is very ingenious and seems to have been anticipated by the Supreme Court of the United States; for we can attach no other meaning to the following language of the supreme court, in Gibson v. Chouteau, than to regard it in advance as an exclusion of the conclusion reached by Judge Jones, that the statute of limitations pointed out the grantee. The United States Supreme Court says: "But neither in a separate suit in a federal court, nor in an answer to an action in ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. *That power can not be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislatinn, in whatever form or tribunal such occupation be asserted.*" Again, "The consummation of the title (in this case by grant) is not a matter which the grantees can control, but one which rests entirely with the government. *With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the right of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.*" Again, "The statute of limitations of Missouri *did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the state. It left the legal title subsequently acquired by the patent wholly unaffected.*" In the case decided by Judge Jones "the legal title subsequently acquired," was, by virtue of the highest act of sovereignty, a congressional grant. The court thinks there is nothing in the doctrine of Gibson v. Chouteau, decided by the supreme court, in conflict with the views announced by it. In Gibson v. Chouteau, plaintiff recovered the land, notwithstanding 50 years adverse possession. In Hammond v. Coleman plaintiffs lose the land because of 40 years adverse possession—both legal titles emanated from the United States within ten years before suit was brought. The two cases are as near alike in principle and fact as they can be; and we can not see how it is possible to reconcile Hammond v. Coleman with the principles of law announced in Gibson v. Chouteau.

Homesteads in Florida — The Premises in which the Right may Subsist.

GREELEY, ASSIGNEE OF JOSEPH W. SCOTT, v. JOSEPH W. SCOTT AND WIFE *ET AL.*

United States Circuit Court, Northern District Florida.

Before Mr. Justice BRADLEY.

Under the constitution of Florida, a homestead is reserved to heads of families, consisting of one hundred and sixty acres of land, if not in an incorporated city or town; but if in such city or town, of half an acre, in either case, without any limit as to its value. In this case the debtor claimed as a homestead a tract of land in an unincorporated suburb of East Jacksonville, consisting of about forty acres, much of which had been laid out into building lots, and on which he resided and had a steam saw mill, which he had operated for many years as his principal business. *Held*, that the mill was appurtenant to and a part of the debtor's homestead, within the meaning of the constitution of Florida; but that the homestead right did not extend to all the adjacent land, and that the district court should separate from the homestead such of the land as was not used by the debtor in carrying on his business.

The assignee in this case filed the bill to prevent the debtor and

his wife from setting up the right of homestead to a certain tract of land in the neighborhood of Jacksonville, which they claim as such. The whole tract consists of about forty acres in an unincorporated suburb, called East Jacksonville, much of which has been laid out into building-lots, and on which the bankrupt resides and has a steam saw-mill, which he has operated for many years as his principal business.

The constitution of Florida, adopted in 1868, reserves to every head of a family residing in the state, and to his heirs, his homestead and one thousand dollars worth of personal property, free from the claims of creditors. If not in an incorporated city or town, it may be a homestead to the extent of one hundred and sixty acres of land; if in such city or town, half an acre without any limit as to value. The reservation, however, is only that of the homestead, and embraces no more, although the party may own more within the prescribed limit of quantity. It is very material, therefore, to know what is meant by and embraced in a homestead. Within the meaning of the constitution of Florida, however it may be elsewhere, it certainly embraces more than a house for shelter; for it may extend to one hundred and sixty acres of land which could never be needed for that purpose alone. As one hundred and sixty acres is the usual quantity for a farm in the country, the policy of the constitution seems to be to allow a man such quantity of land with his house as he is accustomed to use therewith in the pursuit of his occupation. In other words, the object seems to be, not only to preserve to the unfortunate debtor his house for shelter, but his usual means of employment by which to earn his livelihood and support his family. The state as well as the individual himself is interested in his labor and industry; and, therefore, takes care that he shall not be deprived of the power to employ them.

In the case of a farmer, therefore, it is clear that the exemption embraces his house and farm, not exceeding the amount limited; of course it includes (and so the constitution declares) the improvements thereon. Those improvements, however, must be such as to make them properly a part of the homestead, such as outhouses, barns, sheds, wagon-houses, fences, etc. They would not embrace tenant houses, though built on the farm, for these would be no proper part of the farm-homestead. They contain capital separately invested. They produce a revenue of their own distinct from that of the farm.

For the same reason the farmer's homestead would not include a saw-mill, or a grist-mill, or a carding and fulling-mill, though erected on a portion of the tract of which the farm is a part. These are separate enterprises in which the farmer has been enabled to invest his surplus capital. They are no part of the farm. If he runs it he does it as a separate business from that of his farm, and he cannot claim both as appurtenant to and part of his homestead. They constitute the basis of outside and separate industries. A mill-owner, in like manner, may have a farm attached to his mill, and work it as a separate and secondary business. He may claim his mill as part of his homestead, but not the former also; otherwise by multiplying his branches of business and trade a man might have a large domain, consisting of many establishments, and claim them all as incident to his homestead. This never could have been the intent of the constitution. It would be an unreasonable construction of its terms. Those terms must be fairly construed so as to fully carry out the policy of the constitution, and yet not to nullify all obligations of a debtor to pay his debts. That the preservation of a house holder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose, is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvements or buildings than the residence and business house of the owner, showing that the business house as well as the residence is included.

But whilst the cases which we have supposed are comparatively easy of solution, a great many others will arise presenting greater difficulty and embarrassment. The amount of property which the necessary interpretation of the exemption will sometimes embrace, will undoubtedly appear as a great hardship and injustice to creditors. It is a great stride from that state of things in which the sanctity of a debt induced the legislature not only to take from the debtor all his property, but even his liberty itself. It may be a question whether it is not carrying the principle of exemption too far for the public welfare. It is true that the farmer without his farm, the blacksmith without his forge, the miller without his mill, the trader or business man without his shop, in fine any citizen without his place to work and labor, or pursue his ordinary calling, is deprived of the power to support himself and his family, becomes a burden instead of a help to the community. These establishments or places of labor or occupation are respectively adjuncts of a man's homestead, and, within the intent and meaning of the constion of Florida, form a part of it. Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely: whether the advantages obtained by the exemption are equivalent to the disadvantage arising from the unwillingness of capital to remain in a community where such an exemption exists; or whether from the latter cause the law will not operate too depressingly upon enterprise. Speculation however is unnecessary. The people of the State of Florida have, in their constitution, declared what their will is on this subject, and that declaration is binding on both the people and the courts.

In the case under consideration the debtor claims to follow the business and trade of sawing lumber, and asks to have his mill, which adjoins his dwelling, reserved as a part of his homestead. In our opinion this claim is supported by the constitutional provision. The mill in the sense of that constitution is appurtenant to, and part of the debtor's homestead. If it be objected that the value is unreasonably great, we answer that the constitution prescribes no limit of value and the courts can not prescribe one. As before stated we think that a man's shop, store or mill in which he possesses his usual trade or avocation (as well as the farmer's farm), if connected with and adjacent to his dwelling, is intended to be included in his homestead. It is the stand or place on which and by means of which he may continue to pursue his industrial labor and be a useful citizen, and is within the object which the constitution has in view.

But the debtor can not ask to retain those portions of the forty acre tract which are not auxiliary to his homestead, considered as the homestead of a lumber-man running a saw mill.

Those portions will be for the assignee, under the direction of the district court, to separate from the rest. Under the circumstances we do not think the debtor has pursued such a course as to throw undue embarrassments in the way of the assignee, which need to be removed by the interference of a court of equity. The main thing which he claims, the saw mill, we think he is entitled to claim, unless there is some foundation for the allegation of the bill that debts to a large amount, which have been proved, were incurred for the erection of improvements on the mill, and for labor. As this, however, will be a matter which the district court can better investigate, when marshalling the assets of the bankrupt estate, and enforcing any liens which particular creditors may have on particular parcels of property, we do not think there is any call for the interposition of this court.

The motion for injunction is denied and the bill dismissed, without costs and without prejudice to the complainant, as to any part of the property except the house and saw mill and such reasonable extent of land about the same as may be necessary and proper for their enjoyment as a homestead by the debtor and his family, and without prejudice as to the effects of debts contracted for improvement and labor.

We do not think that any decree should be made authorizing the assignee to sell the reversion of the homestead, as the constitution expressly declares that the exemption shall accrue to the heirs of the party having enjoyed or taken the benefit thereof. This however, is also a question which the district court can as well decide as this court, and presents no ground for the interference of a court of equity. BILL DISMISSED.

Note.—We are indebted for this valuable opinion to the courtesy of Hon. William Archer Cocke, Attorney-General of Florida. The question discussed has reference to *the character of the premises in which the homestead right may subsist* The decisions upon this question in other states, and in other federal courts, form one of the most instructing chapters in the law of homesteads. We have not space in this note to indicate in any degree their scope nor do anything more than give a list of the cases, which, so far as our searches have gone, are as follows: Mayho v. Cotton, 69 N. C. 289; Hubbell v. Canady, 58 Ill. 425; *Re* Tertelling, 2 Dillon, C. C. 339; West River Bank v. Gale, 42 Vt. 27; Buxton v. Dearborn, 46 N. H. 43; Martin v. Hughes, 69, N. C. 293; Williams v. Hall, 33 Tex. 412; Adams v. Jenkins, 82 Mass. 146; Kresin v. Man, 15 Minn. 116; Bunker v. Locke, 15 Wis. 635; Tumlinson v. Swinney, 22 Ark. 400; Rayland v. Rogers, 34 Tex. 617; Sarahas v. Fenlon, 5 Kas. 592: Finley v. Dietrick, 12 Iowa, 916; Taylor v. Boulware, 17 Tex. 74; Bassett v. Messner, 30 Tex. 604; Woodward v. Till, 1 Mich. (N. P.) 210; Parker v. King, 16 Wis. 223; Campbell v. McManus, 32 Tex. 442; Thornton v. Boyden, 31 Ill. 200; Gregg v. Bostwick, 33 Cal. 220; Kelly v. Baker, 10 Minn. 154; Clark v. Shannon, 1 Nevada, 568; Mercier v. Chace, 11 Allen, 194; Goldman v. Clark, 1 Nevada, 607; Mills v. Estate of Grant, 36 Vt 269; Lazell v. Lazell, 8 Allen, 575; Brown v. Keller, 32 Ill. 151; Casselman v. Packard, 16 Wis. 114; Herrick v. Graves, 16 Wis 157; Reinbach v. Walter, 27 Ill. 393; Dyson v. Sherley, 11 Mich. 527; Moore v. White 30 Tex. 440; Walker v. Darst, 31 Tex. 681; Wassell v. Tumach, 25 Ark. 101; McDonald v. Badger, 23 Cal. 393; Kurz v. Brusch, 13 Iowa, 371; Stanley v. Greenwood, 24 Tex. 224; Phelps v. Rooney, 9 Wis 70; Prior v. Stone, 19 Tex. 371; Hancock v. Morgan, 17 Tex. 582; Methury v. Walker, 17 Tex. 593; True v. Morrill, 28 Vt. 672; Cook v. McChristian, 4 Cal. 23: Taylor v. Hargous. 4 Cal. 268; Walters v. People, 18 Ill. 194; Rhodes v. McCormick 4 Iowa, 368; Crow v. Whitworth, 20 Ga. 38; Rogers v. Hawkins, 20 Ga. 200; Pinkerton v. Tumlin, 22 Ga. 165; Delaney's Estate, 37 Cal. 176; Thorn v. Thorn, 14 Iowa, 49; Hill v. Bacon, 43 Ill. 477; Williams v. Jenkins, 25 Tex. 279; Beecher v. Baldwin, 7 Mich. 488; Thomas v. Dodge, 8 Mich. 51; Helfenstein v. Cave, 3 Clarke (Iowa), 287.

Sale of Intoxicating Liquor—Civil Liability of Seller where Death Results from Intoxication—Constitutional Law.

BEDORE v. NEWTON.*

Supreme Judicial Court of New Hampshire, December Term, 1873.

Hon. WILLIAM LAWRENCE FOSTER, Chief Justice.
" ELLERY ALBEE HIBBARD,
" CHARLES DOE,
" WILLIAM SPENCER LADD,
" JEREMIAH SMITH, } Associate Justices.

1. **Sale of Intoxicating Liquors—Constitutionality of New Hampshire Civil Damage Act.**—The act of July 2, 1870, which provides that the person who sells or furnishes to another intoxicating liquor, in violation of law, shall be liable, in certain cases where death results, to any person dependent on the deceased for support, for all damage or loss occasioned by such injury, *held* constitutional.

2. ——. **Who may Sue.**—The widow of the deceased, who was dependent on him for support, may maintain an action for damages under this statute.

Case. The declaration is as follows: * * in a plea of the case for that the said defendant, at said Walpole, to-wit, on the first day of february, 1872, did unlawfully keep, furnish, sell, and deliver spirituous liquors to one Louis Bedore, of said Surry, who then and there was the lawful husband of the plaintiff, and upon whom and upon whose labor and efforts she then was, still is, and ever would be dependent for her support and for the comforts of a home, and that by reason of such unlawful keeping, furnishing, selling, and delivering such spirituous liquors as aforesaid to the said Lewis, he then and there drank the same, and thereby was made intoxicated and contentious, and engaged in quarrelling and fighting with certain persons, and was thereby beat, struck, badly assaulted, and injured, physically disabled, mentally deranged, and killed, whereby the plaintiff permanently lost the means of her support, the comforts of a home, and the society and protection of her said husband, and has suffered, and always will suffer, for the necessaries and comforts of life, and from mental anguish.

Also, for that the said defendant, at said Walpole, to-wit, on the first day of February, 1872, did unlawfully keep, sell furnish, and deliver spirituous liquors to one Lewis Bedore, of Surry, in said county, laborer, who then and there was the lawful husband of the plaintiff, and upon whom and whose labor and effort she then was, still is, and ever will be dependent for her support and for the comforts of a home, and also to other persons who were then and there present, and that by reason of such unlawful keeping, selling, furnishing, and delivering such spirituous liquors to said Lewis and to said other persons, they then and there drank the same and thereby were made intoxicated and contentious, and engaged in quarrelling and fighting with each other, and the said Bedore was thereby beat, struck, badly assaulted, and injured, physically disabled for labor and effort, mentally deranged, and killed, whereby the plaintiff permanently lost the means of her support, the comforts of a home, and the society and protection of her said husband, and has suffered, and always will suffer, for the necessaries and comforts of life, and from mental anguish.

Also, for that the defendant, at said Walpole; to-wit, on the first day of February, 1872, did unlawfully sell, furnish, and deliver to Lewis Bedore, then of Surry, in said county, and being the husband of the said plaintiff, upon whom and whose labor and efforts she then was and ever would be dependant for support and for the comforts of a home, and did also at the same time and place, unlawfully sell and deliver to other persons then present, spirituous liquors, which the said Lewis Bedore and other persons then and there drank, and therewith became intoxicated, contentious, and quarrelsome, whereby the said Lewis Bedore was then and there badly beaten, physically enfeebled, and mentally deranged, by reason of which the said Bedore wandered off, became frozen and disabled, and died, whereby the plaintiff lost the society and protection of her husband, her means of support, and the comforts of her home, to the damage of the said plaintiff, as she says, the sum of twenty-five hundred dollars.

The defendant demurred generally.

Lane & Healey, for the plaintiff; *Cushing*, for the defendant.

LADD, J. The material part of the act upon which this suit is brought, is as follows: "In case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case." Laws of 1870, ch. 3, sec. 3.

There can be no question but that the declaration shows a case entirely within the provisions of this statute. It shows that the plaintiff is the widow of Lewis Bedore, who came to his death by reason of intoxication caused by liquor unlawfully furnished to him by the defendant, and that she was dependant upon him for support.

But the defendant says, the action can not be sustained, because the wife has no rights in the person of her husband which can legally be made the basis of a recovery by her of damages for causing his death; that the value of human life is inappreciable, and not capable of being reduced to a pecuniary standard of valuation; and therefore a law which allows damages for its destruction, to be

* To appear in Vol. 54 N. H. Reports.

recovered in money by the person injured, is in violation of the fundamental rights of private property guaranteed by the constitution of the state.

Doubtless it is to be understood as settled, that no remedy exists as common law in favor of the person injured against one who has caused the death of another, even for the direct pecuniary loss and damage occasioned thereby; and so it has been held in this state. Wyatt v. Williams, 43 N. H. 102. It is not important in this case whether the reasons on which this supposed rule of the common law rests are satisfactory or unsatisfactory. We are not called upon to discuss or consider them. I must say, however, that I have never been able to comprehend their force or admit their soundness. That one person may have a direct pecuniary interest in the life of another, and so suffer a direct pecuniary damage as the immediate and necessary consequence of the act which destroys such life, is too plain to require argument or illustration. The pecuniary loss occasioned to the owner of a dumb animal, by the careless or wilful act which destroys its life, is no more the natural, necessary, and immediate result of the act, than the loss occasioned to a tenant, *per autre vie*, by the destruction of the human life upon which his estate depends.

But the question is not whether the rule itself is sound, or whether the various reasons that have been given in its support are consistent and satisfactory, or otherwise; the position of the defendant can only be sustained by going much further, and holding that it is of so high a character as to come within the protection of the constitution against legislative encroachment or repeal. To be sure, the right of possessing and protecting property is guaranteed by the constitution, and that doubtless implies that the property of one shall not be ruthlessly, or without legal cause, taken from him and bestowed upon another. But by what possible stretch can it he said that this act does any such thing? The legislature have done no more than give redress and compensation for damage actually inflicted by one party and suffered by the other, in a case where no remedy was furnished by the law as understood and administered by the courts before.

In England, as early as 1846, the rule we are considering, which obviously had its origin with the courts, was repealed by the legislature. The statute of 9 and 10 Vict., known as Ld. Campbell's Act, after reciting that "no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him," enacts "that, whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

A large number of actions have been brought upon the provisions of this act, wherein it has undergone the careful scrutiny of eminent counsel, as well as the courts. Among the reported cases are, Franklin v. South Eastern Railway Co., 3 Hurlst. & N. 211; Dalton v. South Eastern Railway Co., 4 C. B. (N. S.) 296; Blake v. Midland Railway Co., 18 Q. B. 93; Pym v. Great Northern Railway Co., 4 B. & S. 396; Read v. Great Eastern Railway Co., L. R. 3 Q. B. 555; Rowley v. L. & N. Railway Co., L. R. 8 Exch. 221; —but in no case do I find that it has ever been supposed or suggested, either at the bar or from the bench, that any natural or constitutional right of the subject, with respect to private property, had been invaded by the act.

The same may be said in reference to a similar act, passed in New York the next year after Ld. Campbell's Act, and the cases decided under it;—see Oldfield v. N. Y. & Harlem R. Co., 14 N. Y. 310; Quinn v. Moore, 15 N. Y. 432; Tilley v. Hudson River R. Co., 24 N. Y. 471; McMahon v. Mayor, &c., of New York, 33 N. Y. 642.

Most of the states now have statutes providing, in one way or another, and in terms more or less general, for the recovery of private damages for causing the death of a human being, and we are not aware that the constitutionality of such acts has been called in question in any of the numerous cases which have arisen under them.

We think the position, that the act under which this suit is brought is unconstitutional, for the reason that it gives compensations in damages for causing the death of a human being, can not be sustained.

No question of remoteness has been made before us. But upon that point we are clear that no valid objection can be raised to the act. It is true the injury may not always be the *immediate* consequence of the defendant's illegal act in furnishing the liquor. But what constitutes remoteness beyond the actionable degree is often a perplexing and troublesome question, and certainly it is one with respect to which the decisions of the courts have not been so uniform and clear as to show the existence of a fixed and definite rule, applicable to all cases. Upon principle, it may not be easy to see why the very liabilities imposed by this statute would not follow from a just application of familiar doctrines of the common law without any legislation on the subject at all. But whether that may be so or not, we are satisfied it was entirely within the constitutional power of the legislature to say that a certain mischief resulting from a certain prohibited act should form the basis of a recovery of damages by the person injured; and that no right of property guaranteed by the constitution is infringed.

It has been further argued that the law is a penal law, and that it is unconstitutional because it inflicts a second penalty, to be measured only by the caprice of a jury, for an offence already made punishable by a prescribed and definite fine. This view can not be sustained, for the reason that it is not true in fact. The statute gives to certain specified persons the right to recover the damage actually caused to them by the defendant's illegal act, and nothing more. Whether the defendant has been, or may thereafter be, prosecuted for his violation of the criminal law of the state, no more concerns the party who has suffered a private wrong and damage by the same act in this case, than in case of an assault and battery, a larceny, or other crime, whereby damage is inflicted on an individual by the same act which constitutes a public wrong or crime. DEMURRER OVERRULED.

Mormon Divorces—Alimony Pendente Lite.

ANN ELIZA YOUNG v. BRIGHAM YOUNG.

Territory of Utah, Third District Court, May, 1875.

Before Mr. Chief Justice LOWE.

1. **Ad Interim Alimony—Appeal.**—An appeal will not lie from the District Court of Utah to the territorial supreme court from a decree awarding *ad interim* alimony in a suit for divorce.

2. ——. **Effect of Answer Setting up Bigamous Marriage.**—In a suit for divorce, where the defendant files a sworn answer which, if true, shows the marriage to have been bigamous or polygamous, and the complainant files no replication thereto, and it is not made to appear that such marriage was entered into ignorantly by the complainant, or through fraud on the part of the defendant, alimony *pendente lite* ought not to be allowed.

3. **Pleading—Utah Practice Act—Effect of Answer without Replication.**—The provisions of the 65th section of the Utah practice act, "that every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purpose of the action, be taken as true," and that "the allegation of new matter in the answer shall, on the trial, be deemed controverted by the adverse party," refer to the trial of the merits of a cause, and not to interlocutory proceedings. In such proceedings a sworn answer setting up new matter, to which there is no replication, will have the force of an affidavit.

4. **Case in Judgment.**—Upon a rule to show cause why the defendant, Brigham Young, should not be compelled by attachment to comply with the order heretofore

made in this case (*ante*, p. 204), to pay into court, for the benefit of the plaintiff, alimony and sustenance pending the suit, it is held that such an order ought not to be granted.

Opinion by LOWE, Ch. J.—On the 26th day of February last, an order was made in this cause directing the defendant to pay to the plaintiff, as alimony *pendente lite*, the sum of $9,500, being at the rate of $500 per month from the commencement of the suit; also to pay her $500 per month subsequently during the pendency of the suit, and $3,000 as attorneys' fees to the attorneys of the plaintiff. It appears that under said order and subsequent proceedings, the attorneys' fees, $3,000, and of alimony, $500, have been paid. A rule upon the defendant to show cause why he should not be compelled by attachment to further comply with said order, has been granted, to which the defendant has answered, and the plaintiff now moves for an attachment, and the defendant moves to discharge the rule.

A discharge of the rule is asked upon three several grounds. The first that the court has not jurisdiction of the action. The decision of the supreme court of the territory in the case of Cast v. Cast, and the overruling of the demurrer to the complaint in this cause, seem to conclude that question in this court for this case. Any reagitation of that question should be in the supreme court.

The second ground of defence is that an appeal from the order now sought to be enforced has been taken to the supreme court. If there were any reasonable ground for holding that under the practice act such an appeal was maintainable, I would most gladly act upon it, and thus hope to obtain the opinion of the supreme court upon the order in question; but it seems too plain for doubt that no appeal lies from such an interlocutory order, and that it can not by any admissible construction be embraced in any one of the provisions of section 328 of the practice act, which defines appealable cases. I think, therefore, that the attempted proceedings in appeal are inoperative and nugatory.

There remains for consideration the further ground urged in argument, that upon the pleadings and records such a state of facts is disclosed as shows it to be inequitable to require the payment of *ad interim* alimony.

The plaintiff in her complaint alleges that she intermarried with the defendant on the 6th day of April, 1868, and sets up facts of negligence and desertion, which constitute statutory grounds for divorce. The defendant in his answer makes a qualified denial of the marriage, and alleges by way of avoidance that at the time of such marriage the plaintiff was the lawful wife of James L. Dee, who is still living, and from whom she has never been divorced; that the defendant was lawfully married on the 10th day of January, 1834, to Mary Ann Angell, who then became, and still is, his lawful wife. He further alleges in terms, that the marriage with the plaintiff was a plural marriage, entered into according to the doctrine and customs of the church of the Latter-day Saints. The complaint and answer is each upon oath, and it appears from the record as well as from the statement of counsel in argument, that the order for alimony and expenses was made upon the complaint and answer alone, without any other evidence or showing whatever.

It is the general doctrine of the courts in divorce, that before temporary alimony can properly be awarded, the marriage must be admitted by the parties, or established by proofs. 2 Bishop on Mar. & Div. 402–406.

In the very recent case of York v. York, 34 Iowa, 530, it is said, "alimony is a right that results from the *marital relation*, and the fact of marriage between the parties must be admitted or proved before there can be a decree for it even *pendente lite*." If some exceptional cases to this rule exist, they will be found to proceed upon facts and circumstances having no analogy to the present case. It is also an accepted doctrine, that alimony *pendente lite*, can not be claimed as a matter of right, but that its allowance rests in the sound legal discretion of the courts. In Jones v. Jones, Chancellor Walworth said, "it is not a matter of right under all circumstances, for the wife who has commenced a suit for a divorce or for a separation, to require the court to direct an allowance to be paid to her by the defendant, for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her *ad interim* alimony in all cases." And *ad interim* alimony was refused, because there appeared no probability that the plaintiff ought to succeed in the case. 2 Barb. Ch. Rep. 146.

In Worden v. Worden, the vice-chancellor, said: "If the answer be true the complainant had no just cause of complaint * * * It is not a matter of course in every case, whatever may be the complexion of it, to make an order for temporary alimony;" and *ad interim alimony* was refused on the ground that it did not appear from all that was before the court that the complainant had a meritorious cause of action. 3 Edwds. Ch. Rep. 387. It is also conceded that the order for temporary alimony when made, remains subject to the control of the court during the pendency of the cause. The present case upon the record is in brief this: The plaintiff alleges a marriage and adequate statutory grounds for divorce. The defendant concedes a marriage, but alleges facts as new matter in avoidance and defence, which clearly show the marriage to be bigamous or polygamous. To these new facts alleged there is no denial. How then does the case stand upon such pleadings? It seems to be supposed that such new matter in the answer is to be deemed as controverted by force of the statute. But this is a mistake when applied to an interlocutory proceeding. The 65th section of the practice act declares, "that every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, *for the purpose of the action*, be taken as true. The allegation of new matter in the answer shall, *on the trial*, be deemed controverted by the adverse party." Thus the new matter of the answer is to be deemed controverted only "*on the trial*," the statute not prescribing the character in which the new matter is to be regarded for the other purposes of the action, as is done in the same section in reference to the allegations of the complaint. The allegations of new matter, therefore, in the answer, for the purposes of the action, other than the trial, must have their ordinary legal effect, and that is to regard them as true, unless actually controverted. And such appears to be the character attributed to the answer in interlocutory proceedings by the Supreme Court of California, under a statute which is identical with the 65th section of our practice act as quoted above. Burnett v. Whitesides, 13 Cal. 156, was an appeal from an order dissolving an injunction, the case having been heard upon complaint and answer alone. The answer denied the equity of the complaint and set up affirmative matter in avoidance, and the court says: "The answer of the defendants is as much proof of the defendants' right, as the complaint of the plaintiff is evidence of his right; and the order dissolving the injunction was affirmed. Delger v. Johnson, 44 Cal. 182, a very late case, was also an appeal from an order dissolving an injunction which had been heard upon complaint and answer alone, the pleadings being verified. The answer set up new affirmative matter in defence, which the court says, "if true would justify the court in dissolving the injunction." And in reference to the answer the court says, "it was held in Falkinburg v. Lucy, 35 Cal. 52, and many other cases in this court, that when the defendant moves, on the complaint and answer, to dissolve an injunction, *the answer will be treated, for all the purposes of the motion, as an affidavit*," and the injunction having been dissolved upon the uncontradicted new matter of the answer, the order was by the supreme court affirmed.

The record of this case, therefore, in view of the provisions of the 65th section of the practice act, and the authorities just cited, does disclose, for the purpose of the present enquiry, the uncontradicted fact that the alleged marriage was a bigamous or polygamous marriage. If such a marriage was entered into ignorantly by the complainant, and through the fraud of the defendant, equity will open its doors for her relief; but upon the case as it

stands, it is not in the judgment of the court, according to the principles of equity and good conscience, to enforce the payment of *ad interim* alimony. It appears from the record that the alleged marriage was celebrated in this city; that the plaintiff and defendant both reside in this city. It can not, therefore, be a difficult or expensive duty for the plaintiff to place upon the record a confutation or some explanation of the unexampled and most extraordinary allegations made, if any just explanation exists; and the court believes that such explanation is due to the common principles of equity and public justice, before proceeding further in the direction sought. It would be strange, indeed, if upon such a state of facts, uncontroverted by any rule of pleading or of law, and unextenuated by any evidence, it could be imposed as a duty upon a court of equity to direct or enforce the payment of alimony, and thus bestow the apparent, if not indeed the real sanction of the law upon a practice which is hostile to the civilization of the age, and which the penal statutes of the land visit with condign punishment. The motion for an attachment is denied, and the

RULE DISCHARGED.

Injury to Passenger Travelling on Free Pass with Condition against Liability.

NEVILLE v. THE CORK, BLACKROCK AND PASSAGE RAILWAY CO.

Irish Court of Common Pleas, January 29, 1875.

Before MONAHAN, Ch. J., and KEOGH, MORRIS, and LAWSON, JJ.

[Reported in 9 Irish Law Times Reports, 69.]

A passenger by steamer, holding from the carriers a free pass exempting them from liability in respect of injury to the holder, however caused, during the passage between two stations, entered on board the steamer with the intention of travelling as a passenger for hire, and of proceeding beyond the distance to which he was entitled to travel gratuitously; but that intention was not communicated to the carriers, and the fare was not paid to them. During that part of the transit to which the free pass applied, the passenger sustained personal injuries, and, in consequence, did not travel beyond that distance. In an action against the carriers for damages in respect of the injuries so sustained: *Held*, that the *onus* lay upon the plaintiff of showing that he was travelling as a passenger for hire, and not as a licensee upon the free pass; that the plaintiff, not having communicated his intention to the defendants, had failed to show that he was travelling otherwise than in right of his free pass; and that the defendants was not responsible accordingly.

This was an action brought to recover damages for injuries sustained, through the defendants' negligence, by the plaintiff while a passenger on board the defendants' steamer, which plies between Passage and Queenstown, calling at Monkstown. The defendants, amongst other defences (including a traverse of the negligence alleged, and a defence of contributory negligence), pleaded that the plaintiff was on board the steamer as a mere licensee by virtue of a free pass in writing, gratuitously given to him, and that he was bound by the conditions therein contained as follows: "That it was to be used only by the person in whose favor it is issued, and that the use of it shall be taken as evidence of an agreement with the company that the latter are relieved from all pecuniary liability, or other responsibility to the holder, for personal injury, or for other delay or loss or damage to property, however caused, that may be sustained by such person while using the pass; and the person to whom it is issued is subject to the same by-laws, rules and regulations as the other passengers."

On the trial before Deasy, B., and a special jury, at the Cork Summer Assizes, 1874, it appeared that the plaintiff, the Very Rev. Canon Neville, P. P., was the occupier of a house in Monkstown, which he had built himself; and, in consideration of his having so built and occupied the house, he was given a free pass by the defendants from Monkstown to Passage and back, subject to the above conditions. The plaintiff, on the 13th of April, 1874, went on board one of the company's steamers at Passage, with the intention, as he alleged, of going further to Queenstown and paying his fare of fourpence from Monkstown to Queenstown. He had previously, on the same day, travelled on the pass from Monkstown to Passage, whence he was then returning. The amount of fare from Passage to Queenstown was the same as from Monkstown to Queenstown. The fares of passengers were to be paid on board the steamer, and might be paid at any time during the passage. The intention of the plaintiff to go on to Queenstown, he, on his examination, stated that he communicated to a companion, the Rev. D. M'Namara, who deposed that, to the best of his recollection, the plaintiff had told him so. Before the steamer reached Monkstown the plaintiff accidentally placed his foot in a hole in the deck, and was thus tripped up and injured, in consequence of which he did not complete his journey to Queenstown, but was obliged to get out a Monkstown. The trial resulted in a verdict for the plaintiff for £500 damages; the learned judge reserving leave to the defendants to move to have the verdict entered for them if the court should see fit. A conditional order having been obtained by the defendants, to have either the verdict entered for them pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the weight of evidence.

Heron, Q. C. (with him *O'Brien, Q. C.*, and *Griott*), on behalf of the plaintiff, showing cause.

W. M. Johnstone, Q. C. (with him *G. Fitzgibbou, Q. C.*, and *O'Reardon*), contra.

M'Cawley v. The Furness Railway Company, L. R., 8 Q. B. 57, was cited.

LAWSON, J.—I think this case is free from all doubt that this gentleman, on the day of the accident, used his free pass, and that instead of paying his fare he travelled for nothing. Then, it has been said that by reason of his having formed an intention, in his mind, to go on further, he became a passenger for hire. He altered that intention—he never took a ticket, and got out at Monkstown. In my opinion there was nothing to go to the jury to show that he was not travelling on his free pass. The verdict must be entered up for the defendants.

MORRIS, J.—I am also of opinion that the verdict must be entered up for the defendants. I do not offer any opinion on the other questions which might arise in the case—namely, as to negligence. If the plaintiff had shown that he had gone into the vessel as a passenger from Passage to Queenstown, that might be sufficient evidence to show that he was a passenger for hire; but the moment it was disclosed that he had a free pass or a license, the onus was cast upon him to show that, although he had a license enabling him to go that portion of the journey on which this accident happened, and exempting the company from liability for damages, he was travelling otherwise than in right of that license. This accident happens while he is between Passage and Monkstown. Now, the onus being thrown upon him of showing that he was not then using this license—how does he do that? By showing that in his own mind he intended to go on to Queenstown. He does not tell that to the defendants. They must have supposed that he was travelling on the pass, because it entitled him to go to Monkstown. How were the company to conceive that he was not using his pass? There must be a mutuality of contract. And though this free pass might be determined by word of mouth, it was not determined. I rest my judgment upon the simple ground that the account given by the plaintiff has failed to show that he was a passenger for hire. I believe that the gentleman did intend to go on to Queenstown; but, at the time the accident occurred, he was not between Monkstown and Queenstown.

KEOGH, J.—I am of the same opinion. The condition on which the free pass was given was, that the company should not be liable in respect of personal injury to the passenger using it. It is a license to go to Cork from Monkstown; the plaintiff availed him-

self of that license, and in order to change his position the onus lay upon him to prove that he had assumed a different position. There is no evidence that he ever communicated his intention to any one, except to a companion who was travelling with him. I am, therefore, of opinion that this verdict should be entered up for the defendants.

MONAHAN, C. J.—I am of the same opinion. It appears from this free pass that this gentleman was permitted to travel from Cork to Monkstown; when he entered the vessel, it must be assumed he was travelling on it; for he never intimated to the company that he was going further. There was no case whatever to go to the jury, and the verdict must be entered for the defendants.

CAUSE SHOWN DISALLOWED.

Attorney for the plaintiff: *Gillman.*
Attorney for the defendants: *Julian.*

NOTE.—Appended to the above case is a valuable note, by a writer signing the initials "E. N. B.," in which he discusses only the American cases. These he comments upon as follows: "Although American decisions are not binding as authorities here, they, at all events, possess the weight to be attached to the opinions of professors of the law; but, upon the question as to the liability of carriers for injury to a passenger travelling on a free pass, subject to a restriction against liability, the adjudications differ. In New York such conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employes. Wells v. New York Central Railroad, 24 N. Y. 181; Perkins v. Same, Ib. 196; Bissell v. Same, 25 Ib. 442. In New Jersey it is held that they are good as against ordinary negligence, with a very decided intimation that they would extend as against gross negligence also. Kinney v. Central Railroad Co., 34 N. Y. 513. But in Pennsylvania, Illinois, Indiana, and several other states, the courts hold that no such condition will absolve the carrier from responsibility for the gross negligence of his employes. Ill. Central R. Co. v. Read, 37 Ill. 484; 19 Ib. 136; The Ind. Cen. R. Co. v. Mundy, 21 Ind. 48; Penn. R. Co. v. M'Closkey's Adm'r, 23 Pa. St. 532; Mobile and Ohio R. v. Hopkins, 41 Ala. 489. The writer concludes by quoting at length the opinion of the court in Jacobus v. Saint Paul and Chicago Railway Co., 1 CENT. L. J. 375.

Power of the Trustees of a Town Corporation to Contract for the Engraving of Bank Notes.

CHANEY v. INHABITANTS OF BROOKFIELD.*

Supreme Court of Missouri, May Term, 1875.

Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

The trustees of a municipal corporation, incorporated under the general laws of Missouri, and possessing no powers and subject to no liabilities except such as are imposed and conferred by the statute relating to towns and their incorporation (2 Wagn. Stat. 1313), can not render the corporation which they represent liable to pay a debt contracted by them with a bank note and engraving company, to engrave and print on bank-note paper notes payable to bearer, to be put in circulation as money by such trustees in their official capacity. Distinguishing Alleghany City v. McClurkan, 14 Penn. St. 81, and denying Underwood v. Newport Lyceum, 5 B. Mon. 130.

Appeal from the Common Pleas Court of Linn County.

SHERWOOD, J., delivered the opinion of the court.

The question presented by the record before us, is this: Whether the trustees of a municipal corporation, incorporated under the general laws of this state, and possessing no powers and subject to no liabilities, except such as are imposed and conferred by the statute relating to towns and their incorporation (2 Wagn. Stat. 1313†), can render the corporation which they represent liable for the payment of a warrant drawn on the treasurer of the town, having been issued by order of the trustees, to pay a debt contracted by them with a bank-note and engraving company, to engrave and print on bank-note paper, notes payable to bearer, to be put in circulation as money by such trustees in their official capacity.

An examination of the statute referred to, will conclusively show that no such powers as those attempted to be exercised in the case at bar, were conferred by law on the trustees. Their act, therefore, in contracting the debt and in issuing the warrant in suit, was wholly unauthorized and illegal. And although a warrant signed by the proper officer *prima facie* imports validity and a subsisting cause of action (Dillon Municip. Corp., § 411), yet it is always competent for a municipal corporation, as was done in the court below, even after the issuance of a warrant upon its treasury, to set up the defence of *ultra vires*. Ib., §§ 381, 412, 749; Marsh v. Fulton Co., 10 Wall. 676; Thomas v. Richmond, 12 Wall. 349; Laker v. Brookline, 13 Pick. 343; Clark v. City of Des Moines, 19 Iowa, 199, and cases cited; Brady v. The Mayor, etc., of the City of New York, 20 N. Y. 312.

The authorities above cited, as well as others too numerous for citation, assert in all its broadness the above mentioned doctrine, and its applicability to cases of this character. Those who deal with the officers of a corporation must ascertain, at their peril, what they will indeed be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act.

Nothing here asserted has any reference to a certain class of cases, wherein the doctrine of "implied municipal liability" may be succesfully invoked, as is undoubtedly true in some instances, totally dissimilar, however, from the present one. Dillon Municip. Corp., § 384, and cases cited.

But the plaintiff has urged upon our attention two cases as fully authorizing the recovery which he obtained in the court below; and we will briefly advert to them. The case of Alleghany City v. McClurkan (14 Penn. St. 81), is chiefly based on the proper construction to be placed upon a statute of Pennsylvania, adopted in the year 1828, the first section of which prohibited corporations from issuing contracts or notes of the kind embraced in the action, and the second section imposed a penalty for so doing. But the third section of the act provided expressly that such notes or bills should not be void, and allowed a recovery thereon, with 20 per cent. interest as a penalty from date of issue, so that that case, although employing much loose language, was correctly decided, and affords no support for the position assumed by plaintiffs. The other case upon which he relies, is that of Underwood v. The Newport Lyceum, 5 B. Mon. 130. There it is broadly decided that notwithstanding the corporation was, by the act of 1834, expressly inhibited from the exercise of banking powers, and notwithstanding the officers of the corporation, in the exercise of such powers, would fall under the penal denunciations of the act of 1812, yet that a recovery might be had against the corporation for services rendered in engraving bills, checks and notes, although it might be *presumed* they were to be used and put into circulation in violation of the law and in furtherance of an illegal purpose. This decision, it must be conceded, is directly in point in favor of plaintiff; but, so far as our researches have extended, it stands alone—appears to have been made without any examination or citation of adjudicated cases, is certainly at variance with both reason and authority, ignoring, as it evidently does, that most salutary doctrine which imperatively forbids the exercise of statutory powers beyond the limits originally assigned them by the legislative will, and refuses, when the narrow boundary is transcended, to lend legal sanction to acts which, on their very face, bear the broad stamp of illegality.

Judgment reversed and cause remanded. All concur.

*We are indebted for this valuable opinion, to the courtesy of M. A. Low, Esq., of Gallatin, Mo.

†The provisions of this statute are too numerous to set out at length. Section 2 provides that "the corporate powers and duties of every town so incorporated shall be vested in a board of trustees;" but it is needless to state that among the enumerated corporate powers, the power to issue bank-notes does not appear.—[ED. C. L. J.

Punishment by State Courts of Perjury Committed in the Federal Courts—Habeas Corpus.

JOHN T. BROWN, KEEPER OF THE STATE PENITENTIARY, v. UNITED STATES, *EX REL.* L. A. GOULD, WHO PETITIONS FOR DOCK BRIDGES.

United States Circuit Court, Northern District of Georgia, May, 1875.

A citizen of the United States convicted in a state court of a perjury committed in an United States tribunal, and confined in the state penitentiary, may be enlarged therefrom by a federal district judge, under the writ of *habeas corpus*.

This was an appeal from the decision on *habeas corpus* of Mr. District Judge Erskine, reported in this journal (*ante*, p. 327). The counsel who argued the case before the district judge argued it on appeal.

Opinion by Mr. Justice BRADLEY.

Dock Bridges was indicted in the Superior Court of Randolph county, Georgia, for perjury committed October 22, 1874, in an examination before a United States commissioner, under the enforcement act. The offence though set out according to its circumstances, was charged to have been committed against the laws of Georgia; but it was obvious that it was a crime against the laws of the United States only. It was perjury committed in the course of a judicial investigation under the acts of Congress, and was an offence against the public justice of the United States. By the revised statutes of the United States, sec. 5,392, every person who having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, wilfully and contrary to said oath, states any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine and imprisonment, prescribed by the act, and be thereafter incapable of giving testimony in any court of the United States. Such an offense is exclusively cognizable in the courts of the United States. By sec. 629 of the revised statutes, it is declared that the circuit courts shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except when otherwise provided, and concurrent jurisdiction with the district courts of crimes and offences cognizable therein; and by sec. 711 the jurisdiction vested in the courts of the United States, of all crimes and offences cognizable under the authority of the United States, shall be exclusive of the courts of the several states. The validity of these acts of Congress is not questioned. It would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty. And whilst certain offences, involving breaches of the peace, counterfeiting the public money, etc., may be violations of both federal and state laws, and punishable under both, perjury in a judicial proceeding is peculiarly an offence against the system of laws under which the court is organized and proceeding. At all events, Congress has declared that the courts of the United States shall have cognizance, exclusive of the state courts, of all crimes and offences cognizable under its authority. Hence it was clearly in violation of the laws of the United States for the state court to try and imprison the defendant for the crime in question. The court had no jurisdiction of the case. The proceedings were null and void.

It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the Supreme Court of the United States, and that it is too late for a habeas corpus to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, habeas corpus will lie. *Exparte Lange*, 18 Wall. 163.

As a general rule, when it appears by a return to a habeas corpus that the prisoner is confined upon a regular charge and commitment for a criminal offence, and especially if he be confined in execution after a conviction, he will be at once returned into custody; and to this cautionary and conservative rule the fourteenth section of the judiciary act of 1789 provided, that the writ should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. But the general rule does not apply where the order of commitment is made by a tribunal or officer having no jurisdiction to make it; and the proviso of the fourteenth section of the judiciary act has been greatly modified. The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States; but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its courts; in 1842, when the complications growing out of the McLeod case, and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government; and in more recent times it has been extended to all persons in custody in violation of the constitution or a law or treaty of the United States. The present case belongs to the last category, and is relieved from the impediment to the use of a habeas corpus, which formerly existed where the prisoner was committed under state authority; whilst the want of jurisdiction in the state court removes any impediment arising from the general rule which discountenances its use where the prisoner has been regularly convicted and sentenced.

The order of discharge must be AFFIRMED.

NOTE.—The prisoner was thereupon discharged, but was immediately arrested upon a bench warrant from the United States Court in Savannah, whither he will be sent.

Foreign Selections.

LIABILITY OF RAILWAY COMPANIES FOR DAMAGES TO GOODS LYING AT RAILWAY STATION AFTER TERMINATION OF JOURNEY.—An important decision upon a question touching the liability of railway companies for damage done to goods lying at a railway station after the termination of the journey, was given in the Queen's Bench, on Saturday last, in the case of Mitchell v. The Lancashire and Yorkshire Railway Company. Mitchell is a manufacturer of felt. There was consigned to him a quantity of tow, which was sent to the defendants to be carried to a station on the defendants' line, and to be delivered there to the plaintiff. The tow arrived at the station safely. On the following day an advice note was sent to the plaintiff, stating that the goods had reached the station, that the defendants waited instructions, and that meantime they held the goods, not as common carriers, but as warehousemen, at the owner's sole risk, and subject to warehouse charges. The plaintiff took away a small portion of the tow, but as the quality did not please him he would not accept the rest. Thereupon the defendants stacked the remainder on their premises in the open air, and covered it with a tarpaulin. The tow was damaged by wet and dirt. The plaintiffs having brought an action to recover the amount of damage, obtained a verdict which has been upheld by the Court of Queen's Bench, although it was contended for the defendants that the company was protected from liability for the loss by the terms of the advice note above referred to, inasmuch as it gave to the plaintiff notice that the goods were held at his "sole risk." It will be noticed this contention assumes that the company had occupied a threefold relation to the goods. In the first place they had been common carriers, and therefore insurers of the goods; in the second place they were bailees of the goods, with the ordinary duties of bailees;

and in the third place it was assumed that they were bailees without responsibility by reason of the advice sent to the plaintff. The real question before the court was the effect of the note of advice upon the defendants' liability. Did it free the defendants from all responsibility? To hold that it did do so, would be practically giving to all railway companies an easy method of avoiding all risk under similar circumstances. But clearly such a contention is not only inequitable, but in the strictest sense of the term, illegal. There are well defined duties attaching to all contractual relations. When a man is in the position of a common carrier there are incumbent upon him all the duties recognized by the law as attaching to that position; when, again, a man is a warehouseman, *ex vi termini*, he is clothed with the obligations recognized by law as belonging to that position, and so through all the gradations of contractural relations. If, then, one in either of these positions should limit his responsibility by any formal notice, he must make his meaning very clearly understood. Mr. Justice Blackburn says, in the present case, "the whole of the advice note must be looked at in order to determine its meaning, and that according to its terms, appears to be that the company intended to hold the goods as warehousemen, and subject to warehouse charges. These terms must be construed reasonably." It certainly would not be considered a reasonable construction to suppose that the company were to receive the benefit of all the charges, and incur no liability in respect of the goods.—[*The Law Times.*

CONDITIONS IN RESTRAINT OF MARRIAGE.—It seems strange that the question, whether a gift to a man in which there is a condition in restraint of a second marriage, is void or not, should not have been long ago decided. The question came recently before Vice-Chancellor Hall (W. N., April 17), who decided against the validity of the restraint, but, as it seems to us, without authority. Frances Jackson, by her will, after bequeathing a legacy to her niece, E. A., the wife of R. N. Jackson, directed her trustees to pay the remaining income of her property to the said R. N. Jackson and his wife, for their joint lives, and to the survivor for life. The testatrix declared that if the husband should survive the wife and marry again, the trustees were to hold the property upon other trusts thereinafter mentioned. The husband did marry again, and claimed, notwithstanding, to enjoy the income of the property; and the vice-chancellor held that, having regard to the authorities, his interest had not ceased. We are unable to find any authority for the vice-chancellor's statement. In the notes to Scott v. Tyler, in 2 White and Tudor's Lead. Cas. 216, it is stated that the validity of a condition defeating a gift to a man on his second marriage does not appear to have been decided. But the case there referred to (Evans v Rosser, 2 H. & M. 190), is adverse to the present decision of the vice-chancellor. The bequest was to a testator's son-in-law, "during the term of his natural life or marriage again," with a gift over, "after the decease or marriage" of the son-in-law. Lord Hatherly, then vice-chancellor, held the gift to have been forfeited on the son-in-law's marriage, for the reason, a very artificial, one as we think, that the gift was one for life or until marriage (the vice-chancellor had to insert the word "until" to support this construction), and not a condition in defeasance of a prior gift. The validity of a restraint on a widow's marriage, which for a long time was supposed to extend only to a testator's widow, was extended by Vice-Chancellor Page Wood in Newton v. Marsden (2 J. & H. 356), to all widows. A testator was naturally supposed to have an interest in his wife's widowhood, especially if there were children; and in Newton v. Marsden the testator had put himself *in loco parentis* to the children of the marriage. But we can not see why a woman should not have the same interest in her husband's remaining unmarried, in view of the possible unkindness of a stepmother, and why on the analogy of Newton v. Marsden, the rule should not be extended to any widower. In the early case of Lowe v. Peers (4 Burr. 2225), where a man entered into a bond not to marry anyone except the obligee, and the bond was held void as against marriage generally, Mr. Justice Aston, not confining his words to the case of women, remarked that there is a difference between a first and second marriage. "The restraint of a first marriage is contrary to the general policy of the law, to public good and the interests of society; but the frequent customs of copyholds intimate that the restraint of a second is not so." Moreover, the freebench of a widower in gavelkind lands ceases on his second marriage. We do not think, therefore, that either authority or analogy supports the decision of the vice-chancellor.—[*The Law Times.*

Correspondence.

THE BRIGHAM YOUNG DIVORCE CASE—AN OUTSIDE VIEW OF THE MATTER.

DENNISON, TEXAS, May 27, 1875.

EDITORS CENTRAL LAW JOURNAL:—That Chief Justice McKean's conduct as a judge in Utah was not unmixed with passion and bias, can scarcely be denied. But as a matter of equity, can Brigham Young plead his own wrong, and take advantage of it, to defeat the allowance of alimony, *pendente lite* or otherwise? If he inveigled Ann Eliza into a polygamous marriage, is he not morally bound for her support? Should he be heard to say, "I married you according to the manner of our peculiar institution, but now I deny that you have any right to share my purse?" Is wife No. 1 less guilty than the rest, if the first marriage was entered into with the polygamous intent to inaugurate the prevailing system? The fact that she was *first* to catch the great apostle of polygamy should have but little bearing upon the case. To grant *her* alimony under like circumstances, and yet deny it to the other deluded victims of an institution to which Brigham has dedicated his life, would be dispensing equity with a vengeance.

Ann Eliza was trained in this belief by the very man she afterwards married; our government has tacitly sanctioned the "institution," by permitting the Mormon delegate to sit in the halls of Congress and proclaim his doctrine to the country, and now shall the High Priest be backed in his refusal to do justice to one of his victims, merely because he dodges behind a technicality that he avowedly despises? Certainly not. If their delegate is allowed to attend to their wants in the national congress, with the same propriety may not justice and equity be extended to them as between each other by the national courts?

It might be "strange" to award the alimony, but it is stranger still for a court of conscience to rebuke a woman who asks bread at the hands of the hardened sage who wrought her delusion and ruin. She has been the cats-paw, and let the monkey soothe her pangs with a few money-plasters. The best way to foster and encourage the cause of the "Latter-day Saints" is to shield their pockets while their practices are at the same time tolerated. Is not this being done?

It is a poor rule that won't work both ways, and if Brigham is so anxious to live by his doctrine, let him also fall by it, like a man and a true saint. An honest martyr never bridged his difficulties with a hateful technicality.

Respectfully, M.

The Missouri Constitutional Convention.

Our record of the proceedings of this body closed last week with the convention debating the 12th section of the bill of rights. As near as we can gather, by comparing the imperfect reports of the daily press, the following sections constitute the remaining portion of the bill of rights, as adopted:

12. No person shall for a felony be proceeded against criminally, otherwise than by indictment; in all other cases offences shall be prosecuted criminally by indictment or information as concurrent remedies; provided that all cases arising in the land or naval forces, or in the militia in time of war or public danger, may be prosecuted by indictment or informaion.

13. That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his own confession in open court; that no person can be attainted of treason or felony by the general assembly; that no conviction can work corruption of blood or forfeiture of estate, but the estate of such persons as may destroy their own lives shall descend and vest as in cases of natural death, and when any person shall be killed by casualty there shall be no forfeiture by reason thereof.

14. That no law be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

15. That no *ex post facto* law, nor law impairing the obligations of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the general assembly.

16. That imprisonment for debt shall not be allowed, except for the non-payment of fines and penalties imposed for violations of law.

18. That the right of no citizen to keep and bear arms in defence of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question, but nothing herein contained is intended to justify the practice of wearing concealed weapons.

19. That no person elected or appointed to any office or employment of trust or profit under the laws of Missouri, or any ordinance of any municipality in this state, shall hold such office without personally devoting his time to the performance of the duties of the same.

20. That no person can be eligible to any office of trust or profit till he shall have accounted for and paid over all public money for which he may be accountable.

21. No person who shall hereafter be adjudged guilty of embezzling any money, belonging to whomsoever, or of appropriating to his own use, or that of another, any money or other property received by him in trust or confidence from another as distinguished from a debt, or arising out of the casualties of ordinary trade or business, shall be eligible to any office of trust or profit under the laws of this state, or the ordinances of any municipality thereof, until he shall have made good any such defalcation.

22. That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity as may be prescribed by law, and that whenever an attempt is made to take private property for any use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicial question determined without regard to any legislative assertion that the use is public.

23. That private property shall not be taken or damaged, for public use, without just compensation, and the compensation shall be the fair value, in money, of the property taken. Such compensation shall be ascertained by a jury, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for such owner, the property shall not be disturbed, or the proprietary rights therein be divested.

24. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the ground and cause of the accusation, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf, and a speedy and public trial by an impartial jury of the county.

25. That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted, be again for the same offence, put in jeopardy of life or liberty; but if the jury, to which the question of guilt or innocence is submitted, fail to render a verdict, the court before which the trial is had, may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.

26. That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great.

27. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28. That the privileges of *habeas corpus* shall never be suspended.

29. That the military shall always be in strict subordination to the civil power; that no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.

The majority and minority reports of the committee on representation were then taken up. As this is a matter exclusively political in its character, it will not be discussed in these columns.

Notes and Queries.

SATISFACTION OUT OF HOMESTEAD PROPERTY—ANSWER TO "FOG."

MONTGOMERY, ALA., May 28th, 1875.

EDITORS CENTRAL LAW JOURNAL:—I enclose a reply to your coresspondent, "Fog," *ante* p. 176. As the opinion is short, and he complains of "limited libraries," I hope you will pardon me for giving the case entire.

Respectfully, R. D. RUGELEY.

Ray v. Adams et al., 45 Ala.

Adams filed his bill to forclose a mortgage on certain premises, given to secure the purchase money thereof; Fitzpatrick the mortgagor, and Ray, a judgment-creditor of Fitzpatrick, were made parties defendant. Ray, by cross bill, admitted the superior lien of the mortgage; but contended that prior thereto his execution had been levied on the mortgage premises; that Fitzpatrick claimed a portion of it as a homestead and exempt from levy; and the remainder thereof had been sold under his execution, and bought in by him, and he claimed both as judgment-creditor and purchaser under the execution, and he insisted that the assets should be so marshaled that Fitzpatrick's part (the homestead) should be sold first—it being Fitzpatrick's debt. The cross bill was dismissed by the court below, and Ray appealed from the decree.

BY THE COURT—SAFFOLD, J.—The point at issue is: Which is the superior right, the debtor's claim to the exemption of his homestead, or that of his creditor to the payment of his judgment?

Notwithstanding Adams by his contract had a lien which excluded Fitzpatrick's privilege of exemption against him, and between him and Ray, he might have been required to sell the land in parcels, so as to preserve the rights of the subsequent creditor; yet the right of exemption came in next to the contract-lien. It was prior to the lien of the judgment, and even if not, would have prevailed over it. Watson v. Simpson, 5 Ala. 233; Hale v. Cummings, 3 Ala. 398; Lamar v. Gunter, 39 Ala. 324; Rev. Code, §§ 2880, 2884.

If a judgment-creditor may put his debtor to the selection of his homestead, and sell a portion of his property not protected by it, and then require a mortgagee of the whole to apply the homestead first to the satisfaction of the mortgage, he would deprive the debtor of his homestead, which he could not do if there was no mortgage. How can the mortgagee thus enlarge his remedy? The decree is affirmed.

Note.—Assets will not be so marshaled as to injure the common debtor.—Willard's Eq. Jur 338 (Ed. 1863); Story's Eq. Jur. § 560.

Abstracts of Opinions of the Supreme Court of the United States.

[Prepared expressly for this journal, by HENRY A. CHANEY, ESQ., of Detroit, Mich.]

Jurisdiction of Probate Courts.—Perris v. Higley, opinion by Miller, J. 1. The act of Congress organizing the territory of Utah (9 U. S. Stat. 453), stands as the constitution or fundamental law of the territory, establishing a complete system of local government, creating the courts, and distributing the judicial power among them. It gives to the district and supreme courts jurisdiction at common law and in chancery, and provides for a review of their decisions, but does not provide for any review of the decisions of the probate courts. 2. The judicial power of probate courts in this country is to be determined from their general nature and jurisdiction as known in the history of the English law and in the jurisprudence of the United States. Their almost uniform purpose has been the establishment of wills and the administration of estates, to which is occasionally added the guardianship of infants and the control of their property, the allotment of dower, and perhaps other similar subjects. Their mode of proceeding is not governed by the rules of the common law. 3. A statute of the territorial legislature giving to probate courts original, civil and criminal jurisdiction in chancery and at common law, and declaring that their practice shall be governed by the same general regulations as is that of the district courts, is void, it being inconsistent with the general history of our jurisprudence and with the spirit of the organic act in defining the courts of the territory, distributing the judicial power among them, and conferring upon the supreme and district courts, general chancery and common law jurisdiction, and inconsistent also with the nature and purposes of a probate court as authorized by the act of Congress. It would also leave the federal and territorial courts with the same jurisdiction, in which case the power of the former might be obstructed or evaded at the pleasure

of the latter. Lockrene v. Martin, McCahon's Rep. 60; Dewey v. Dyer, Id. 77; Graham v. Kelly, 1 Kansas, 116; People v. DuRell, 1 Idaho, 30; Moore v. Kenby, Id. 55.

Patentable Combinations.—Dane v. Chicago Manufacturing Company, opinion by Bradley, J. A new combination of which all the parts have been used before, may be patented if it produces new and useful results, and not a mere aggregation of results. But when the combinations, as well as their separate elements, have been anticipated, the invention is not patentable, even though more conveniently adaptable than its predecessors to the purpose for which it is intended.

Equitable Relief for Fraud.—Monger v. Shirley, opinion by Swayne, J. Shirley was a rebel sympathizer who went from Tennessee to Georgia early in the war. Some time after he had gone, according to Monger's story, a man calling himself John W. Westmoreland, came through the Union lines to Shirley's old home, and sold to Monger, for its face in confederate paper, there passing for ten cents on the dollar, a promissory note which purported to have been executed to Westmoreland by Shirley, and was then underdue. Judgment was rendered against Shirley, on this note by default, and his Tennessee farm was sold to Monger under the judgment. Evidence indicates that the note was a forgery, to which Westmoreland, if there was any such man, was a party. Monger also bought the life estate in the premises in certain confiscation proceedings, but before the sale was confirmed, he intervened and represented that before the libel of information was filed against them, he had attached the premises, and that his lien was prior and paramount to that of the government. The court below decreed that the money he had paid, less the costs, be refunded to him, and that the United States Marshal execute to him a deed for the life estate, at the same time enjoining him perpetually from asserting the title. 1. The power of a court of equity to annul judgments and decrees, and all titles acquired under them, for fraud, where the rights of *bona fide* purchasers have not intervened, is well settled. Freeman on Judgments, §§ 486, 489-91; 1 Story Eq. § 252. 2. By the order below, the proceedings in behalf of the United States were used to convey a title, for which the government received nothing, to Monger, who paid nothing for it. If the attention of the court had been called to the error in the entry, it would doubtless have been corrected. Fay v. Wenzel, 8 Cush. 315. And even if the marshal's deed did pass the legal title to the life estate, Monger must be held, under the circumstances, to have taken it, as he took his title under the attachment proceedings, in trust—*ex maleficio*—for Shirley, and subject to all his equities. A title so acquired must not defeat the rights of the owner of the land, and confirm the iniquity practiced on him.

Sale of Real Estate by Contract—Equitable Interest Terminated by Abandonment.—Jennisons v. Leonard's Executors, opinion by Hunt, J. Leonard was the surviving partner of the Beldon Lumber Company, which had contracted to sell to one Cole a tract of timber land, upon certain terms of payment, yearly. Cole agreed to remove at least 3,000,000 feet of timber each year, and to make monthly payments of $3 a thousand for every thousand feet cut and removed. If the monthly payments fell short of the annual payment, he was to make up the deficiency. Cole executed to the Jennisons, a bill of sale of 1,000,000 feet of the logs cut on the premises, together with three chattel mortgages thereon, as security for advances they had made to him. Not being paid the amounts thus secured, the Jennisons went on the lands, took possession of the timber theretofore cut by Cole, and began to remove it. They subsequently recognized Leonard's interest in this property, and undertook to pay what was due on the contract to Leonard, and what should become due so long as they operated under said chattel mortgage. But within two months a dispute rose as to the amount due, the Jennisons refused to "operate" further, abandoned the land, and removed no more timber. Leonard then entered into possession of the land for the alleged breach of contract by non-payment, and took all the down timber not removed, which he transported to a saw-mill, cut into lumber and loaded upon vessels to send to Chicago, where the Jenninsons seized, sold and converted it to their own use, claiming that the logs from which it was manufactured were theirs by virtue of the mortgages to them from Cole. Leonard's executors brought action for this taking, and recovered judgment, which is now affirmed. The only question was whether the facts are sufficient to support the judgment. 1. The facts set forth will not support the theory of a tenancy at will, nor of a lease, there being neither lessor, lessee, nor subject of demise, the exhaustion of the supposed demise, *i. e.* the timber, leaving no reversion worth taking. 2. This was one of the sales of real estate by contract, in which the title remains in the vendor, and the possession passes to the vendee in whom an equitable interest vests, to the extent of his payments, and who, when he has obtained a full equitable title, may compel a conveyance of the legal title by the vendor, his heirs or assigns. The vendor is trustee for the vendee, for the use of the legal title, to the extent of the latter's payment. The case differs from that of a conveyance, subject to a condition subsequent, which being broken, re-entry or a claim of title for condition broken is necessary to enable the vendor to restore to himself the title to the estate. In that case, the legal title having passed out of him, some measures are necessary to restore it. In this, no legal title passes, and whatever puts an end to the vendee's equitable interest, as notice, agreement of the parties, surrender or abandonment, places the vendor where he was before the contract was made. 3. No mode of terminating an equitable interest, is more perfect than a voluntary relinquishment by the vendee, of all rights under the contract, and a voluntary surrender of the possession to the vendor.

Military Law—Leave of Absence—Pay.—United States v. Capt. Williamson, opinion by Hunt, J. 1. An army officer absent from duty "with leave," can go where he will during the permitted absence, employ his leisure as he pleases, and surrender his leave if he chooses. All that can be required of him is to report himself at the expiration of his leave. 2. An officer directed to proceed to a place specified, there to await orders, must go to that place and remain there, and is as much under orders as if he were in the field. 3. The regulation of the pay of army officers belongs to the legislative department of the government, and neither the executive department, nor any branch of it, can reduce the wages fixed by congress.

Replevin—Liability on the Bond—Practice, where the Judgment Appealed from is not in the Record.—Sweeney *et al.* v. Lomme, opinion by Miller, J. (The following are also Justice Miller's head notes): 1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff, or the party for whose benefit the bond was given, depends upon the code of practice of Montana territory, this court will not reverse the decision of the supreme court of that territorty, on the construction of their code. 2. In a suit on a replevin bond, the defendants can not avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value, even if that were an error for which that judgment might be reversed. 3. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability. 4. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevined, limited by the debt still due on the attaching creditor's judgment, and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond. 5. When it appears for the first time in the argument of a cause that the judgment appealed from is not in the record, the court of its own motion, may allow plaintiff in error *certiorari*, and time to prodnce a certified copy of it.

Navigation—Collisions—Vessels Meeting "end on."—Peters v. Schooner Dexter, opinion by Clifford, J. 1. The precautions prescribed by Congress for the prevention of collisions, are obligatory whenever they apply, *e. g.* if two sailing ships are meeting end on, the helms of both must be put to port. 13 Stat. at L. 60. 2. Although the rules of navigation require sufficient lookouts, yet where it appears that the officer in charge of the deck saw the approaching vessel, yet so distant that no precaution to avoid a collision had become necessary, and also appears that the want of a lookout did not, and could not have contributed to the collision, the vessel omitting such a proper precaution, will not be held responsible for the consequences of the disaster, if, in all other respects, she is without fault. Farragut, 10 Wall. 337. 3. Sailing-ships are meeting end on, within the meaning of the eleventh sailing rule prescribed by Congress, when they are approaching each other from opposite directions, or on such parallel lines as involves risk of collision on account of their proximity, and when the vessels have advanced so near to each other, that the necessity for precaution to prevent such a disaster begins. The time of this necessity can not be definitely defined, as it must always depend somewhat upon the speed of the respective vessels, and the circumstances of the occasion. The Nichols, 7 Wall. 664.

Title by Execution Sale—Pact De Non Alienando.—Watson v. Bondurant, opinion by Bradley, J. 1. In Louisiana, an execution sale of tangible property fails to transfer title, unless the property has been actually seized by the sheriff. As to the application of this doctrine to personal chattels or securities, see Simpson v. Allain, 7 Rob. 504; Flutner v. Bullard, 2 Ann. 338; Offal v. Monquil, 2 Ann. 785; Taylor v. Stone, *Id.* 819; Gaines v. Merchants' Bank, 4 Ann. 370. For its application to lands, see Corse v. Stafford, 24 La. Ann. 263; Williams v. Clark, 11 La. Ann. 761, also 12 Ann. 275; 19 Ann. 58; 23 Ann. 512. Actions of nullity have been sustained on this ground. Kilbourne v. Frellsen, 22 Ann. 207. It is not understood to be necessary to a valid seizure, that the person in possession should be turned out, but something more than a mere constructive taking is required.

2. The insertion in the sheriff's act of sale of the *pact de non alienando*, by which the purchasers bind themselves not to alieniate, deteriorate or encumber the property to the prejudice of a special mortgage reserved upon it, pispenses with the necessity of making any other persons than the mortgagors parties to a judicial proceeding on the mortgage, but does not relieve the mortgage creditor from the requirement to pursue the forms of law, in making a compulsory sale. Villapalma v. Abat and Generes, 21 Ann. 11.

Practice—Affirmance of Judgment for Want of Sufficient Assignment of Error.—Treat v. Jemson, opinion by Waite, Ch. J. Supreme court rule 21, requires that the brief of counsel for a plaintiff in error, shall contain (1) a statement of the case, and (2), an assignment of the error relied on, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged; and without such assignment counsel will not be heard except at the court's request, and errors not assigned according to this rule will be disregarded, though the court at its option may notice a plain error not assigned. In this case there was no such assignment of error as was required by the rules, and as the court saw no error in the record that ought to be noticed without an assignment, the judgment of the court below was affirmed.

Legal News and Notes.

—A PUBLIC meeting was recently held at Glasgow, at which the following resolution was adopted: "That this meeting considers the late trial of the claimant as a mockery of both law and justice."

—THE Washington Chronicle says that Judge Peck, of the court of claims, will be 70 years of age this month. He has been in the service ten years, and will go upon the retired list next winter, when he will be succeeded by Hon. Halbert E. Paine, of Wisconsin. Judge Loring, who has been for two years entitled to the privilege of retiring, has expressed no intention of doing so as yet.

—AN exchange says that the decisions of various district judges against the constitutionality of the enforcement act, and the fact that several cases arising under that act are before the Supreme Court of the United States, have induced the attorney-general to suspend further action in ku-klux cases throughout the South. This suspension has rendered the retention of special agents of the department of justice unnecessary, and several of them have resigned.

—ACTS OF THE LAST SESSION OF CONGRESS.—The secretary of the state gives notice that the pamphlet edition of the laws of the second session of the forty-third Congress, prepared pursuant to law, is ready for sale at the department of state. The price as fixed by law is sixty-five cents. The volume can be forwarded by mail, on the receipt of price and six cents (the legal postage) additional, or by express as the purchaser may direct, in either case at his risk.

—PRIVILEGE IN OLDEN TIMES.—It may be useful, in the "grand and awful times" in which we are at present living and moving, to recall attention to the method by which certain periodicals managed last century to evade the consequences of a prohibition issued by parliament against the publication of its proceedings. In the year 1737 the House of Commons unanimously resolved "that it is a high indignity to, and a notorious breach of the privileges of this house, for any news-writer, in letters or other papers (as minutes or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination, to presume to insert in the said letters or papers, or to give therein, any account of the debates or other proceedings of this house or any committee thereof, as well as during the recess the sitting of parliament; and that this house will proceed with the utmost severity against such offenders." This terrible fulmination so shook the nerves of those enterprising periodicals of the day, the Gentleman's Magazine and the London Magazine, that they had recourse to an ingenious but unworthy plan for escaping the penalties with which they were threatened, and at the same time satisfying the curiosity of the public. The Gentleman's Magazine published debates in the "Senate of Lilliput," under the names of Lilliput and Brobdignag, while the London Magazine gave a journal of the proceedings and debates in a political club, with Roman appellations. Thus artfully did these magazines overpower the wisdom of parliament, and frustrate its intentions.—[*The Irish Law Times.*

—PARDONS.—The following order in regard to the manner of proceeding to obtain pardons, has been promulgated by the department of justice:

DEPARTMENT OF JUSTICE,
WASHINGTON, May 17, 1875.

To the end that pardons may not be granted unadvisedly and against the best interests of good government, all applications for executive clemency through this department, must be made hereafter upon the sworn petition of some creditable person, stating, as nearly as may be, the age, nativity and prior occupation of the party imprisoned; stating also the name of the judge who presided at the trial, and the name of the district-attorney who conducted the prosecution, and whether the applicant for pardon has ever before been convicted of crime. The petition and all letters in support thereof must state explicitly the reason why the executive clemency is invoked to abrogate or change the sentence of the court; and no motives urged upon this department will be considered unless the same are stated in writing, signed by the parties urging them, and filed for permanent record and publicity in case the pardon is granted. The application must be accompanied by evidence that notice of the petition and of all supporting documents has been served upon the judge who presided at the trial and upon the district-attorney of the district wherein the trial was had, when such service of notice is practicable, at least ten days before the petition is presented to the President. It shall be the duty of the district-attorney, whenever any application shall be referred to him for a report, to ask the judge who pronounced sentence for his opinion upon the merits of the application, and to have the answer of the judge accompany the report of the district-attorney whenever such answer can be obtained. The various district-attorneys of the United States will take notice of this order.

EDWARDS PIERREPONT, Attorney-General.

—A GREAT LEGAL CONTEST.—On Friday last some of the younger members of the Saint Louis bar put aside their gravity long enough to play a match at foot-ball, for the benefit of the Newsboy's Home. The contestants were divided, according to the color of their hair, into *blondes* and *brunettes*. The blondes were: Frank J. Bowman (Captain), R. W. Goode (1st Lieut.), P. N. Jones (2d Lieut.), A. W. Mead, L. A. Groff, W. J. Sharman, C. E. Shead, J. C. Normile, F. E. Richey, W. L. Garesche, Geo. A. Schutte, Jos. S. Laurie, Fergus Graham, A. W. Slayback and John J. Martin. The brunettes were: R. S. McDonald (Captain), Angus Cameron (1st Lieut.), W. H. H Russell (2d Lieut.), R. W. Claiborne, A. J. Kennedy, Franklin Ferris, A. M. Thayer, Ben. F. Clarke, Aug. Binswanger, Frank Ryan, R. E. Collins, J. P. Vastine, A. M. Sullivan, Alex. Garesche, Jr. and Col. Peebles. Judges Lindley, Jones and Wickham, of the Saint Louis Circuit Court, acted as referees. The brunettes won the choice of position, and at half past four the ball was tossed into the air, when a general rush was made for it, during which the center of motion of Mr. Ryan got so far outside his center of gravity that he descended softly to the grass. First down for the blondes. Meanwhile Col. Sullivan endeavored to stay the eastward progress of the ball by sitting down on it, but one of the more active blondes put in a demurrer, and the gallant colonel imprinted upon the yielding soil a map of the world in two hemispheres. At the same time Mr. Mead endeavored to catch the ball on the fly, but it eluded him like a client who has compromised his case and not paid his fee, and he extended an elegit upon a piece of swamp land one foot by six. The mud stuck to him like an impecunious female client, and greatly retarded his zeal during the remainder of the game. Just at this moment Capt. McDonald muffled the ball and made for the goal of the brunettes; but the whole bar dove for him as though he had been a dead man's estate and in the melee the first score was call for his side.—On the *second inning* the sides were changed and the blondes had the advantage of the wind. The ball having been sent up, Mr. Garesche endeavored to seize it and run it home, but this was ruled inadmissible. Exceptions were taken, and the whole game broke up into an animated forensic debate, in which many able speeches were made, but without the loss of much time, because all spoke at once. The previous decision, however, was affirmed, declaring the victory in favor of the blondes.—Cæsar reassured his soldiers with a speech, and so Captain McDonald now strode up and down the files of war, brandishing his plug hat and animating his troops. They resumed their wonted courage and revived, and in the *third inning* victory was declared in favor of the brunettes.—The *fourth inning* was by far the most protracted and interesting. Many fouls were claimed and allowed. Back and forth "the battle swerved with many an inroad gor.d; deformed rout entered and foul disorder;" in the midst of which victory perched on the standard of the blondes.—*Fifth inning*. Captain McDonald now summoned his o'erwearied forces—again brandishing his plug hat in the air and shouting "Once more unto the breach, dear friends, once more;" and the battle quickly resulted in his favor.—The *sixth inning* was declared a draw, and the seventh resulted in favor of the blondes, which made a *tie*.—The *eighth inning* decisive of the game, was now to be fought. Capt. Bowman now animated his soldiers with a speech; nor was Captain McDonald wanting in words such as breathe "heroic ardor to adventurous deeds." After a fierce struggle, victory rested with the blondes, the score being as follows:

Blondes.—0, 1, 0, 1, 0, 1, 1. Total, 4.
Brunettes.—1, 0, 1, 0, 1, 0, 0. Total, 3.